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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 492

CHARLES M. COLEMAN and the **RIVERTON URANIUM CORPORATION**, a corporation,

Petitioners,

vs.

MOUNTAIN MESA URANIUM CORPORATION, a corporation,

Respondent,

CONSOLIDATED WITH:

RIVERTON URANIUM CORPORATION, a corporation,

Petitioner,

vs.

MOUNTAIN MESA URANIUM CORPORATION, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Charles M. Coleman and Riverton Uranium Corporation respectfully petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment of said Court filed on July 8, 1958, and entered on the same date in consolidated causes Nos. 5747 and 5748 in said Court, affirming the judgments of the United States District Court for the District of Wyoming in consolidated causes Nos. 3966 and 4041 Civil in that Court (R. p. 54 and R. p. 179, respectively).

The memorandum opinion rendered by Honorable Ewing T. Kerr in the District Court appears in the record beginning at page 43, and the opinion of the Court of Appeals (257 F. 2d 382) is reproduced as an appendix to this petition.

Petitioners filed a "Petition for Rehearing in the Court of Appeals in connection with its said judgment on July 26, 1958, which petition was denied on August 7, 1958.

Upon application of petitioners, the Court of Appeals stayed its mandate until November 5, 1958, pending the filing of this petition.

This petition for a writ of certiorari is being filed within the time allowed for the filing thereof.

Jurisdiction of this Court.

This Court has jurisdiction to review this cause under the following provisions of Section 1254 of Title 28, *United States Code, Judiciary and Judicial Procedure*:

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.
>
> "(2) • • •
>
> "(3) • • •"

The broadness of the power of review possessed by this Court is indicated by the provisions of Section 2106 of Title 28:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Review on a writ of certiorari in this cause is also sought pursuant to the terms of Rule 19 of the Rules of this Court,

entitled "*Considerations Governing Review on Certiorari*", which indicates the character of reasons which will be considered by this Court:

> "(a) • • •
>
> "(b) Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The jurisdiction of this Court is specifically invoked on the ground that the proceedings in the Courts below were clearly erroneous and perpetrate a gross injustice upon petitioners, this Court having plenary power to correct such error and injustice and so prevent miscarriages of justice.

That this Court will grant certiorari to remedy gross injustice, even in cases of no general public importance, is reflected by what has been written on the subject. For instance, the rather complete and well-documented book entitled "Jurisdiction of the Supreme Court of the United States" by Reynolds Robertson and Francis R. Kirkham contains the following, at page 538:

> "Thus, while review on certiorari is 'in the interest of law, not in the interest of particular parties', the granting of writs of certiorari, since the 1925 act, in a number of obscure cases of no general importance, indicates that the interest of the law is deemed to be subserved by the correction of patent error and injustice."

And, in an article entitled "The Supreme Court's Business Under Hughes" (63 Harvard Law Review 13) by Edwin McElwain, the following appears:

> "The Chief" (that is, the late Chief Justice Hughes) "had several purposes in going into the merits of a case on petition for certiorari or the jurisdictional statement. First, he was interested in preventing grave miscarriages of justice, and occasionally he would recommend the grant of certiorari in a case of no public importance whatever simply because the decision below was unjust, unreasonable, or plainly wrong."

In the case at bar, the judgments of both lower Courts are predicated upon the premise that petitioners' predecessor in interest "abandoned" all right, title, and interest in and to the mining properties involved herein before assigning the same to petitioners and that the latter therefore lost all right, title, and interest in and to the said property because of said "abandonment".

As a matter of fact, there was no such "abandonment", and even a cursory examination of the record will reveal (1) that there is not one iota of competent evidence supporting the finding of "abandonment", and (2) that documents introduced into evidence, binding upon respondent, completely refute the premise.

The judgments of the lower Courts grossly violate the requirements of establishing "abandonment" as laid down by this Court in the case of *Baglin* v. *Cusinier Co.*, 221 U. S. 580, 597.

By decreeing "abandonment" in the face of written instruments containing clear, decisive and conclusive evidence negating it, the lower Courts also violated the binding pronouncement laid down by this Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394, the leading case on the effect of oral testimony in conflict with contemporaneous documents.

This Court, therefore, is not asked to weigh evidence pro and con on the subject of "abandonment". It is merely asked to examine the record sufficiently to satisfy itself that, under the circumstances, the finding of "abandonment" by the trial Court and affirmance of said finding by the Court of Appeals were clearly erroneous and perpetrated a gross injustice upon petitioners in this cause. There is no other question involved in this proceeding.

If this Court does this, petitioners feel certain that it will grant the writ of certiorari and the review that petitioners respectfully pray for.

STATEMENT OF THE CASE.

In the United States District Court for the District of Wyoming, Honorable Ewing T. Kerr, presiding, Causes Nos. 3966 and 4041 Civil in that Court were consolidated for trial. The two causes were likewise consolidated for appeal in the United States Court of Appeals for the Tenth Circuit (Causes Nos. 5747 and 5748). Charles M. Coleman and the Riverton Uranium Corporation, hereinafter sometimes referred to as "Coleman" and "Riverton", respectively, will be referred to as "petitioner" or "petitioners" throughout this petition and Mountain Mesa Uranium Corporation, hereinafter sometimes referred to as "Mountain Mesa", as "respondent."

The only question involved so far as this petition is concerned is whether or not Riverton's predecessor in interest (San Juan Uranium Exploration, Inc., a Colorado Corporation, hereinafter referred to as "San Juan") "abandoned" the uranium mining properties in Fremont County, Wyoming, involved in this cause, leaving it without anything to assign to Riverton and rendering the settlement agreement between San Juan and Riverton (Pltfs. Ex. 39; R. p. 892) and the assignment (Pltfs. Ex. 12; R. p. 853) whereby San Juan transferred all right, title and interest in the said properties to Riverton meaningless and of no avail.

Should this Court uphold the finding of "abandonment" by the two lower Courts, petitioners will, of course, have exhausted their legal remedies. On the other hand, should the contention of petitioners that there was no abandonment be upheld and the cause remanded for further proceedings, their interest in the said properties will, at long last, have been established and they will be free to develop the said properties and produce therefrom the mineral that is so vitally needed for the defense of our Country and the rest of the free world and for the many important civilian uses which are increasing in number from day to day.

Petitioners feel that it is necessary to include in this statement of the case only such facts as will enable this Court to determine that question.

The verified complaint with four attachments (R. p. 2) was filed in the United States District Court for the District of Wyoming by appellants in Cause No. 3966 on December 9, 1955. The jurisdiction of the District Court was invoked because of diversity of citizenship, plaintiff Coleman being a citizen of Illinois, plaintiff Riverton being a Nevada corporation and defendant Mountain Mesa being a Wyoming corporation. San Juan was included as a defendant, but on September 12, 1956, it entered into the said settlement agreement with Riverton and the following day made a written assignment to Riverton of its mining rights in the properties involved herein and the cause was dismissed as to San Juan (R. p. 5).

Coleman, on July 30, 1955, entered into an agreement with San Juan whereby he acquired the right to take over the mining rights in and to certain uranium and mineral mining claims, 115 in number, located in the Gas Hills Area of Fremont County, Wyoming. The agreement is Pltfs. Ex. 2 (R. p. 840).

The said mining rights had, in turn, been acquired by San Juan from Mountain Mesa, pursuant to an agreement between them dated May 2, 1955 (Pltfs. Ex. 1, R. p. 840), San Juan being entitled to retain 75% of net profits derived from the mining operations it conducted, and Mountain Mesa being entitled to the remaining 25%.

The Coleman-San Juan agreement provided for submission to Mountain Mesa by San Juan of a revised and supplemental agreement which was to supersede and take the place of the said agreement dated May 2, 1955. Certain obligations were imposed upon Coleman in his agreement with San Juan (Pltfs. Ex. 2; R. p. 840), contingent upon execution by San Juan and Mountain Mesa of this revised and supplemental agreement. Coleman subsequently assigned his rights to Riverton (Pltfs. Ex. 3; R. p. 840).

Coleman's attorney prepared the revised and supplemental agreement, and it was executed by San Juan and Mountain Mesa on September 26, 1955, being pre-dated September 7, 1955, by agreement (Pltfs. Ex. 4; R. p. 843). On September 29, 1955, Coleman was notified that the revised and supplemental agreement had been executed (Pltfs. Ex. 5; R. p. 843). The notification, pre-dated September 8, 1955, by agreement (R. p. 654), was as follows:

"Mr. Charles M. Coleman,
Suite 609
139 North Clark St.,
Chicago 2, Illinois.

"Dear Mr. Coleman:

"With respect to the Agreement dated July 30th, 1955, by and between San Juan Uranium Exploration, Inc., and yourself, regarding the acquisition of certain rights in connection with uranium and mineral mining claims located in the Gas Hills Area District of Freemont County, Wyoming, please be advised that the lease agreement between our concern and the Mountain Mesa Uranium Corporation has been revised in accordance with Paragraph 2 of our aforesaid Agreement with you.

"Attached hereto and made part of this letter is a draft of said Agreement, as revised.

"You are hereby requested to make remittance of the sum provided for in Paragraph 3 of our aforesaid Agreement, and also to institute the action provided for in Paragraph 6 of said Agreement.

"Yours very truly,
San Juan Uranium Exploration, Inc.
by (Signed) Wm. C. Chadwell
William C. Chadwell, President"

Coleman took immediate steps to comply with the provisions of his said agreement with San Juan. On October 1, 1955, only two days after he received the said notification, he remitted the required payment of $2,500.00 (Pltfs. Ex. 6, 6-A, and 6-B; R. p. 843). He also promptly took the other required action (R. pp. 252, 259, 260, 396, and 403). On October 10, 1955, Coleman received a letter from San

Juan (Pltfs. Ex. 7; R. p. 844), returning the remittance of $2,500.00. Coleman replied promptly (Pltfs. Ex. 8; R. p. 844), retendering payment in currency (R. pp. 249, 263, 264, 400, 401, and 402) and attaching a photostatic copy of the notification (Pltfs. Ex. 5; R. p. 843). Coleman's letter stated:

> "Under the circumstances, your return of the check for $2500.00 heretofore forwarded to you is puzzling, since such payment was made not only pursuant to the provisions of the contract outstanding between us, but also pursuant to your specific request contained in your letter dated September 8, 1955 (a photostatic copy of that letter is attached hereto, to refresh your recollection)."

The Coleman reply concluded with the following:

> "The undersigned views the apparent attempt by San Juan Uranium Exploration, Inc., to disregard its contractual obligations very seriously. Please be advised that we shall hold your company to the strictest performance of the terms of its contract with me, and, should it be necessary, I shall not hesitate to take immediate legal action to secure specific performance of the terms thereof and prosecute an appropriate action to collect damages occasioned by the delay (already considerable) caused by your failure to perform."

On October 19, 1955, San Juan wrote Coleman (Dfts. Ex. E; R. p. 903), returning the $2,500.00 payment for the second time. His letter was silent about and made no comment whatsoever concerning Coleman's reference to the previous San Juan request for payment (Pltfs. Ex. 5; R. p. 843). Chadwell's letter said, however, that, owing to a default notice served upon San Juan by Mountain Mesa, all of its rights had been lost, so that "San Juan does not have a farm-out agreement to transfer to anyone". It was also averred that the alleged default "has arisen from the uncertainty resulting from our negotiations with you."

The following day, October 20, 1955, San Juan made a shipment of ore under the allegedly defaulted and lost contract (See Pltfs. Ex. 32, Count II, Pars. 3 and 4, R. p. 860).

The default notice in question (Pltfs. Ex. 10; R. p. 849) had been served by Mountain Mesa upon San Juan on October 7, 1955, eleven days after the revised and supplemental agreement (Pltfs. Ex. 4; R. p. 843) had been entered into between the parties, that agreement specifically allowing a 20-day grace period before any default could accrue.

The October 7, 1955, default notice related to a portion, only, of the claims involved herein, specifically excluding the Sunset, Sunrise and Hazel claim groups.

After San Juan returned Coleman's remittance for the second time, he deposited the check sent by San Juan (Pltfs. Ex. 11; R. p. 851), placing thereon the following special indorsement:

> "This check represents the unwarranted a return of payment called for in agreement dated July 30, 1955, between payee and San Juan Uranium Exploration, Inc., made by tender of Federal Reserve Notes of same amount; accepted for deposit under protest by payee, to be held on behalf of said corporation and subject to its further order."

Coleman also promptly replied (Pltfs. Ex. 19; R. p. 853) to the San Juan letter of October 19, 1955, again tendering full performance under the July 30, 1955, agreement, in the following terms:

> "In view of the continued refusal of San Juan Exploration, Inc. to honor its contractual obligations, I shall not make the situation ridiculous by once again forwarding the funds which you have heretofore requested, and have now purported to return. I have already made a good and sufficient tender of payment called for by our agreement, and I am prepared to live up to my end of the agreement 100%."

On October 24, 1955, San Juan shipped 80,460 pounds of uranium ore from Rim Claim No. 59, one of the "defaulted" claims included in the October 7, 1955, default notice (Pltfs. Ex. 10; R. p. 849).

On October 25, 1955, a conference took place at the Park Lane Hotel, Denver, between San Juan and Mountain Mesa, both represented jointly by English (Mountain Mesa President), and Attorney Murane, and Messrs. Coleman, Deimerly, Albert W. Dilling and Kirkpatrick W. Dilling, at which time further demands for performance were made by petitioners, and an unsuccessful attempt was made to settle the differences between the parties (R. pp. 297, 298, 408).

Later the same day, attorney Murane stated over the telephone that another party had offered the sum of $500,000.00 for the properties involved herein (Note: The July 30, 1955, Coleman-San Juan agreement called for a total payment of $75,000.00 plus assumption of "cost expenses" totaling $28,550.27), and that unless Coleman, *et al.*, accepted their proposition to purchase the properties (at a price many times the amount specified in the July 30, 1955, agreement), the deal with the other party would be closed immediately. (R. p. 409)

On December 2, 1955, Coleman made a further and final demand for performance, served upon San Juan and Mountain Mesa (Pltfs. Ex. 9; R. p. 845), tendering the full purchase price involved under the July 30, 1955, agreement, and offering full performance of any contractual obligations whatsoever under the July 30, 1955, agreement (Pltfs. Ex. 2; R. p. 840) or the revised and supplemental agreement (Pltfs. Ex. 4; R. p. 841).

Cause No. 3966 was filed in the District Court shortly thereafter, being a suit by Coleman and Riverton, as third party beneficiaries, for specific performance by San Juan

and Mountain Mesa of the terms of the agreement of July 30, 1955, and the revised and supplemental agreement provided for therein.

The complaint stated that Mountain Mesa and San Juan failed to deliver evidence of good title, as required of them, that no assignments evidencing transfer of the mining rights in the properties involved had been delivered, and that Mountain Mesa and San Juan collusively and wrongfully had attempted to deny to appellants said mining rights, and that to implement that denial, Mountain Mesa, as "an obvious subterfuge", purported to declare San Juan in default, said complaint praying that this subterfuge be not permitted to succeed; Count I of the complaint prayed for specific performance of all conditions precedent under the aforesaid agreements, including submission of evidence of good title; for delivery of suitable assignments evidencing transfer of mining rights, and for damages in the sum of $250,000.00.

The said complaint contained a "Count II" alleging a conspiracy on the part of San Juan and Mountain Mesa and certain of their officers to injure petitioners in their business through issuance and spreading of false statements. The trial Court held that petitioners had failed to sustain the necessary burden of proof as to Count II and dismissed it. No appeal was taken from this ruling of the trial Court.

The discovery deposition of San Juan by William C. Chadwell, its President, was taken in this cause by petitioners, in Denver, on January 12, 1956, and it was filed herein on March 17, 1956. Excerpts therefrom are included in the reproduced record, Case 5423, at pages 61 to 92, inclusive. The discovery deposition of Mountain Mesa, by Homer Otto English, its President, and Louis England, its Secretary, was taken in this cause by petitioners, in Casper,

Wyoming, on January 14, 1956, and it was filed herein on March 2, 1956. Excerpts therefrom are included in the same record, at pages 99 to 132, inclusive.

Motions to dismiss both counts of the complaint were filed in said cause alleging merely failure to state a claim upon which relief could be granted. Hearing on these motions was had on March 19, 1956, at Cheyenne. At that hearing, it was elected to have the motions to dismiss considered by the Court as motions for summary judgment. The Court forthwith denied San Juan summary judgment.

On April 12, 1956, the Court granted Mountain Mesa summary judgment and dismissed the complaint as to it. An appeal was taken to the United States Court of Appeals for the Tenth Circuit from the order granting Mountain Mesa summary judgment. That Court, on December 28, 1956, reversed the order (240 F. 2d 12), paving the way for a hearing on the merits.

Meanwhile, negotiations between petitioners and San Juan had resulted in the execution, on September 12, 1956, of a settlement agreement whereby all difference between the parties were resolved (Pltfs. Ex. 39; R. pp. 892 to 897, incl.).

Under the terms and conditions of said agreement, San Juan agreed (Paragraph 1 thereof) to deliver to Riverton a written assignment of its mining rights in the properties involved herein, as theretofore acquired under the provisions of its May 2, 1955, agreement with Mountain Mesa (Pltfs. Ex. 1; R. p. 840) and the revised and supplemental agreement superseding said agreement, entered into September 26, 1955 (Pltfs. Ex. 4; R. p. 843).

In the settlement agreement, San Juan made specific covenants and warranties concerning the status of its rights, disavowing that the same had been lost or set over to anyone.

On September 13, 1956, San Juan delivered the written assignment (Pltfs. Ex. 12; R. pp. 110, 111, and 112), to Riverton.

Riverton immediately notified Mountain Mesa (Pltfs. Ex. No. 21; R. p. 857), transmitting a photostatic copy of the San Juan-Riverton assignment, again demanding that Mountain Mesa furnish evidence of good title, as required under Paragraph 11 of the revised and supplemental agreement (See reproduced R., Case 5423, p. 27), and advising that preliminary work would commence immediately on the Sunset group of claims, under the direction of Riverton's General Manager.

On September 29, 1956, Mountain Mesa commenced Cause No. 4041 in the District Court (R. p. 94), a "quiet-title" action against Riverton covering the properties involved herein, and also obtained a temporary restraining order from the trial Court to prevent Riverton from doing any mining work on said properties (R. p. 101).

In said Cause 4041, Riverton filed its sworn answer (R. p. 161), affirmatively alleging and setting forth (R. pp. 162, 163, 164) its mining rights in the properties involved herein, as acquired, first as a third-party beneficiary to the agreement of July 30, 1955 (Pltfs. Ex. 2; R. p. 840), and the revised and supplemental agreement (Pltfs. Ex. 4; R. p. 841), and second, as holder of said mining rights derived from a clear direct and unbroken chain of interest. The agreements of May 2, 1955, and July 30, 1955, the revised and supplemental agreement, and the assignment from San Juan to Riverton were expressly pleaded, in *haec verba*, by reference.

In said cause, Riverton also filed its counterclaim (R. p. 164) for damages aggregating $1,000,000.00, based upon its loss of mining revenues from the properties involved

herein, loss of transactions for joint mining operations, and loss of valuable financing, all alleged to be due to Mountain Mesa's actions in preventing Riverton from asserting its duly vested equitable and legal mining rights in said properties.

A trial of the consolidated causes was had commencing at 10 A.M. on Monday, April 29, 1957, and concluding at 10 P.M. on Friday, May 3, 1957. The complete trial transcript is included in the Record at pages 217 to 839.

At the trial, seven witnesses testified for petitioners, four of them by deposition (witnesses Coleman, A. J. Tondi, Steward R. Carter, Jr., and William J. Roberts). Seven witnesses (one Albert W. Dilling, being called as an adverse witness) testified for respondent including San Juan's President, Chadwell, and San Juan's attorney, Secretary, and director, Hosford. One of respondent's witnesses (Allen) testified by deposition.

Forty-five exhibits were offered and introduced by petitioners. Respondent introduced twenty exhibits.

On June 26, 1957, the trial Court filed its nine-page memorandum opinion (R. p. 43), ruling against petitioners and in favor of respondent in both causes.

On July 8, 1957, the trial Court entered its findings of fact and conclusions of law, ruling against appellants and in favor of appellee in both causes (R. pp. 167 and 179.)

The trial Court also entered judgment in both causes, dismissing appellants' complaint in Cause 3966 (R. p. 54), and quieting title in favor of appellee and releasing its bondsman, in Cause No. 4041 (R. 179).

On July 17, 1957, appellants filed in each cause motions for amendment of findings and for new trial and amendment of findings (R. pp. 54, 60, 185, and 191), requesting a hearing on said motions.

The trial Court denied the said motions on July 31, 1957 (R. pp. 86, 209) without granting the requested hearing.

An appeal to the Court of Appeals was taken from the rulings of the trial Court adverse to petitioners in their entirety, in both of said causes.

Petitioners filed their notices of appeal in these causes on August 28, 1957 (R. pp. 86, 209).

The Record filed in the Court of Appeals in this cause consists of six volumes, including the reproduced record in the related Cause No. 5423 in said Court, which has been designated as "Volume 1-A".

On July 8, 1958, the United States Court of Appeals for the Tenth Circuit filed its opinion in this cause (see appendix hereto, also 257 F. 2d 382), affirming the judgments of the trial Court.

This petition for a writ of certiorari seeks a review by this Court of the adverse judgment of both lower Courts.

ARGUMENT.

THE FINDING BY THE LOWER COURTS THAT SAN JUAN "ABANDONED" ITS RIGHTS TO THE PROPERTIES INVOLVED IS NOT BASED UPON ANY SUBSTANTIAL OR COMPETENT EVIDENCE AND IS CLEARLY ERRONEOUS.

The adverse judgments of the trial Court decreed "abandonment" by San Juan of all right and interest in the properties involved, acquired under its agreements with Mountain Mesa. The opinion of the Court of Appeals affirming the judgments of the trial Court upholds the finding of abandonment by San Juan. The following excerpt from that affirming opinion clearly indicates the importance attached to the question of "abandonment" by the Court of Appeals (257 F. 2d 383):

> "There is evidence in the record tending to show implied ratification" (that is, by San Juan of its agreement with Coleman dated July 30, 1955, subsequently assigned to Riverton by Coleman), "and there is also a debatable issue of forfeiture in view of the time and content of the default notice. But *if the Court did not err in its finding on abandonment,* a discussion of ratification is academic, and a decision on the harsh grounds for forfeiture of San Juan's rights is unnecessary, for *abandonment assuredly puts all matters to rest.*" (Emphasis added.)

Thus, the Court of Appeals, in effect, has decreed that the question of "abandonment" is the sole one that has to be finally determined by this Court, should petitioners be granted certiorari in this cause. This is precisely what petitioners contend. As briefly as possible, petitioners, at this point, will review just what the record in this cause contains that has some bearing on the question of "abandonment."

Finding of "Abandonment" Clearly Erroneous.

A finding of such "abandonment" in this cause is clearly erroneous. It is not only unsupported by clear and convincing evidence, or by any evidence, but is clearly belied by countervailing evidence refuting abandonment.

On September 12, 1956, San Juan entered into a settlement agreement (Pltfs. Ex. 39; R. 892 to 897, Incl.) with Riverton resolving all differences between them. That agreement provided, in Paragraph 1 thereof, that San Juan would deliver to Riverton a written assignment of its mining rights in the properties involved in these causes, acquired from Mountain Mesa. The following day, San Juan executed the document assigning all of its right, title, and interest in the said properties to Riverton (Pltfs. Ex. 12; R. 110, and 112).

This, as noted, was in *September,* 1956.

On May 2, 1957, when Chadwell, San Juan's President, was testifying, he was asked the following question (R. 628):

> "I will ask you whether or not San Juan has abandoned any and all interest in that property" (that is, the property involved in these causes) "insofar as your organization is concerned?"

Naturally, since, as noted, San Juan had assigned all of its said interest to Riverton the preceding September, he answered:

> "They have."

This constitutes the sole testimony in the Record pertaining to "abandonment" by San Juan, and it cannot by any stretch of the imagination or any amount of specious reasoning be made to support the theory that San Juan "abandoned" its interest in the said properties at the time it was served with the purported default notice.

The question answered by Chadwell was, it will be noted, *has* San Juan "abandoned any and all interest in that property," not *had* San Juan "abandoned" such interest,

or *did* San Juan "abandon" such interest at the time the purported default notice was served upon it?

It is apparent, therefore, that both lower Courts misconstrued this testimony by Chadwell and erroneously considered it as establishing "abandonment" by San Juan at or about the time it was served with the purported default notice, more than eleven months before San Juan entered into the said settlement agreement with Riverton and executed the assignment to the latter of all of its rights and interest in the properties involved.

If this testimony by Chadwell is construed to alter and vary the terms of the said settlement agreement and the subsequent assignment from San Juan to Riverton, both of which documents were executed by Chadwell as President of San Juan and conclusively negate "abandonment", it constitutes a gross violation of the parol evidence rule. This contention was discussed in detail, with citation of authorities, in petitioners' brief filed in the Court of Appeals at pages 57 to 60, inclusive.

San Juan, through Chadwell, its President, did write to Coleman on October 19, 1955 (Dfts' Ex. E, R. p. 903) advising that San Juan had received a default notice (Pltfs' Ex. 10) "cancelling" San Juan's "'farmout' contract" with Mountain Mesa *on all except the Sunset, Sunrise and Hazel claims.* The letter does not say, as the Court of Appeals opinion, no doubt inadvertently, states, that all of San Juan's rights had been lost, but it does say that "San Juan does not have a farm-out agreement to transfer to anyone."

The said opinion states that the Chadwell letter corroborates and supports a finding that there was an abandonment of the properties involved.

However, the serving of a default notice could not support a finding of "abandonment". It, rather, on the other hand, invokes a "forfeiture" of the rights acquired in

the properties covered by it. And, as the opinion states: "Forfeiture is harsh and disfavored."

Chadwell's letter, if taken at face value, constitutes a running recitation of San Juan's purported unsuccessful efforts to *avoid a forfeiture* of its mining rights, and nowhere does it state that San Juan has *voluntarily abandoned* said rights. Under these circumstances, no abandonment could possibly be predicated upon said letter, as concisely and distinctly set forth in the very authorities cited in the said opinion.

The opinion in the case of *Del Giorgio* v. *Powers*, 81 P. 2d 1006, one of these authorities, contains the following, at page 1013:

> "As was said in *Stephens* v. *Mansfield*, 11 Cal. 363, 366: 'Abandonment must be made by the owner, *without being pressed by any duty, necessity or utility to himself, but simply because he desires no longer to possess the thing;* and further, it must be made without any desire that any other person shall acquire the same; for if it were made for a consideration it would be a sale or barter, and if without consideration, but with an intention that some other person should become the possessor, it would be a gift'." (Emphasis added.)

Section 242, *Thornton Oil & Gas*, also one of these authorities, states (page 150, 1956 Supplement):

> "Abandonment rests upon the intention of the lessee to relinquish the lease while forfeiture is an enforced release, which may be unintentionally or unavoidably committed by lessee with no design to relinquish his rights. An abandonment consists of the two factors of intention and *voluntary act*, which may be proved by circumstances, the evidence being clear, unequivocal and decisive." (Emphasis added.)

The opinion in the case of *Hudspeth* v. *Schmelzer*, 77 P. 2d 1123, another one of these authorities, contains the following, at page 1125:

> "On September 14, 1935, plaintiffs notified the defendants by the letter referred to above that they were

starting proceedings to cancel the lease, and the conduct of defendants subsequent to that time is principally relied upon to establish abandonment. The defendants did nothing further toward the development of the premises during the 7 months' interval between the giving of the notice and the filing of this action, but their inactivity is explained by the fact that they expected suit to be filed at any time and did not want to invest any more money in the project pending the threatened litigation. The delay under such circumstances cannot be said to evidence an intention to abandon."

And (page 1126):

"However, plaintiffs further contend that the defendants acquiesced in the declaration of forfeiture of September 14, 1935, in that they made no effort to get in touch with plaintiffs and adjust their differences. But, in view of the nature of the letter, the defendants were under no duty to communicate with the plaintiffs to attempt to make them retract their declaration. Such a declaration of forfeiture is an attack upon the title of the lessees, and they are thereby relieved of the duty of proceeding further during the continuance of such attack. *Chapman* v. *Bowers Gud'n*, 1937, 180 Okl. 49, 67 P. 2d 788; *Simons* v. *McDaniel*, 1932, 154 Okl. 168, 7 P. 2d 419; *Consumers' Gas Trust Co.* v. *Worth*, 1904, 163 Ind. 141, 71 N.E. 489; *LaFayette Gas Co.* v. *Kelsay*, 1905, 164 Ind. 563, 74 N.E. 7; *Texas Pac. Coal & Oil Co.* v. *Patton*, 1922, Tex. Com. App., 238 S.W. 202."

The lower Court judgment in the *Hudspeth* case was reversed.

The opinion in the case of *Texas Co.* v. *Curry*, 229 S.W. 643 (not cited in the Court's opinion herein), states (page 645):

"But the issue of abandonment was not presented in the case; nor were plaintiffs in a position to invoke it as to the land in controversy, since they expressly repudiated the lease and, in effect, forbade any development of that tract." (Citing authority.)

The Court's opinion herein states:

"Abandonment is voluntary, forfeiture coercive." (Citing authorities.)

Obviously the Chadwell letter telling of the default and purporting to recite San Juan's unsuccessful efforts to *defeat a coercive forfeiture* could never constitute corroboration of a *voluntary abandonment.* Rather, it refutes, any such contention. This in and of itself would fully justify this Court in granting certiorari in this cause to the end that it may determine for itself that the record does not contain one iota of competent evidence to support the finding of abandonment or to show an intention on the part of San Juan to abandon the properties involved.

Record Overwhelmingly Belies Abandonment.

1. There are the *written statements of the parties* showing that as of September 26, 1955, only a short time before the time of the alleged abandonment, *San Juan was then and had been conducting mining operations on the properties involved herein.* This is set forth *in the revised and supplemental agreement itself* (Pltfs. Ex. 4; R. p. 843), to-wit, the second "Whereas" clause, on page 2 of said document, which states the following:

> *"Whereas, party of the second part, pursuant to the terms of said agreement entered upon said properties, commenced mining operations thereon, and continues to conduct said mining operations."* (Emphasis added.)

The record also reveals that San Juan and Mountain Mesa included statements in the "sales agreements" executed by them on the same date (Dfts. Exs. Nos. M and N) that San Juan had theretofore entered upon the properties involved herein, "commenced mining operations thereon, and *continues to conduct said mining operations.*" (R. 863, 872.) (Emphasis added.)

2. Eleven days before receiving the purported default notice, San Juan had not only entered into the revised and supplemental agreement provided for in its July 30th con-

tract with Coleman, but it had also entered into two "sales agreements" with Mountain Mesa whereby it was to acquire virtually all of Mountain Mesa's interest in the properties. Thus, as of the time when the default notice was served, San Juan was *increasing*, not *abandoning* its interest in the properties involved herein. The transparency of this whole situation is well illustrated by the following from the testimony of English (Reproduced R., Case 5423, p. 120):

> "Q. At that particular time (*i.e.*, October 10, 1955) the sales contract had already been executed by San Juan and Mountain Mesa?
>
> "A. That is right.
>
> "Q. They were to pay Mountain Mesa $250,000.00 for all Mountain Mesa's rights?
>
> "A. San Juan was to pay Mountain Mesa subject to the terms and conditions of the contract.
>
> "* * *
>
> "Q. Let me ask you this, Mr. English, how do you reconcile the fact of serving a default notice on parties from whom you expected to get $250,000.00 for the outright sale of the same claims involved?
>
> "A. *We were defaulting one contract; the other contract was still in existence;* they were two separate contracts, completely distinct and separate from each other." (Emphasis added.)

It is worthy of note that the trial Court finding concerning alleged abandonment carefully excluded mention of any abandonment of San Juan's rights under its purchase agreements with Mountain Mesa, the finding stating (R. 52) only that San Juan "abandoned all rights and interests acquired through the *May 2 and September 7, 1955 Contracts.*" (Emphasis added.) The purchase agreements were concededly and undeniably in full force and effect at the time of the alleged abandonment.

Thus a mere matter of days before the time when an "abandonment" allegedly occurred, San Juan had not only entered into a revised and supplemental agreement with Mountain Mesa which strengthened and confirmed

the mining rights it hitherto had enjoyed in the properties involved, but it also acquired rights under two other contracts with Mountain Mesa, irrefutably in full force and effect at the time of the alleged abandonment, whereby it was to secure *all of Mountain Mesa's theretofore retained interests in said properties.* This evidence conclusively refuting any intention of abandonment was wholly overlooked by the Court of Appeals, no mention thereof being made in its opinion.

3. On October 13, 1955, appellee's witness, Hosford, San Juan attorney, Director and Secretary addressed a letter to the "Riverton Ranger" (Pltfs. Ex. 28; R. pp. 433, 858). The Court will note that the purported notice of default had been received by San Juan five days before, so that, presumably, it had then already "abandoned" all of its rights in the properties involved herein.

Said letter contains the following:

> "*San Juan is shipping uranium ore* to the Riverton buying station from the Hazel claims in the Green Mountain area. These claims being a part of San Juan's working agreement with Mountain Mesa. These ores have assayed as high as .26%.
>
> "Shipments of uranium ore were being made from the Sunrise and Sunset groups of claims prior to suit instituted by the Globe Mining Company challenging title to these claims. San Juan acquired its right to mine these claims through its working agreement with Mountain Mesa. As soon as the question of title is settled, *San Juan contemplates a resumption of regular shipment from these properties* . . .
>
> "From the exploratory work done to date, plus the volume of ore shipped, San Juan is highly optimistic over the future of both Gas Hills and Green Mountain areas as being capable of steady ore production." (Emphasis added.)

Does this letter by one of San Juan's officers disclose that San Juan had "abandoned" its rights in the properties involved herein, or does this portion of an announcement to the press proclaim to all that San Juan intended

to continue to exercise its mining rights in said properties?

Although the Court of Appeals opinion mentions this document, its legal import and effect as to any abandonment by San Juan, or intention to abandon, was completely overlooked.

4. The documentary evidence in this cause irrefutably shows that San Juan continued mining operations after the date of the alleged abandonment.

Included in the record in this cause (as Pltfs. Ex. 32, R. p. 546) is a certified copy of the complaint filed in the matter of *Mountain Mesa Uranium Corporation, Plaintiff* v. *San Juan Uranium Exploration, Inc., Defendant,* Cause No. 3992 Civil in the trial Court.

The following paragraphs, appearing in Count II of said complaint, are of interest:

> "3. That on the 7th day of September, 1955, plaintiff and defendant entered into a revised agreement, photostatic copy of which is attached hereto and by reference herein made a part hereof, and identified as Plaintiff's Exhibit No. 2. That attached to said Exhibit No. 2 is exhibit identified as Schedule B.
>
> "4. *That under the terms and provisions of said contract* the defendant went upon the properties known as the Rim Claims early in September, 1955, and *on the 20th day of October,* 1955, *made shipments of ore* to the buying station from said Rim claims . . . " (Emphasis added.)

At the trial herein, Mountain Mesa President English confirmed (R. 804) that the corporation had authorized filing of this legal action and he identified the signature of the corporation's attorney on the complaint (Pltfs. Ex. No. 32). Petitioners' counsel then read certain portions of the complaint to English and inquired if that refreshed his recollection as to whether San Juan shipped ore at a time after the date of the default notice, English replied (R. 805): "Yes, it does."

The above matters were completely overlooked by the Court of Appeals when it rendered its opinion.

The opinion states:

> "Further testimony in the record shows that mining operations on the claims after the default notice were carried on by agents of Mesa rather than by San Juan."

Obviously, Mountain Mesa would never have sued San Juan in connection with ore shipments made after the time of the alleged abandonment if those shipments had actually been made *by Mountain Mesa's own agents.* The testimony referred to in the opinion of the Court of Appeals was and is thus thoroughly impeached and discredited by the irrefutable written record, and should have been given no weight or consideration whatsoever.

5. The written record made by San Juan itself confirmed ore shipments after the date of the alleged abandonment. San Juan President Chadwell admitted that he wrote Mountain Mesa's counsel as follows on January 4, 1956 (R. 676):

> "This is to advise that we shipped 77,770 pounds of ore from Rim 35 on October 20, 1955, and 80,460 pounds of ore from Rim 59 on October 24, 1955."

It will be noted that both dates mentioned are subsequent to the time of the alleged abandonment. The written record made by San Juan thus confirms that made by Mountain Mesa and shows that, far from abandoning the properties prior to October 19, 1955, San Juan continued operations thereon. The testimony to the contrary, mentioned in the Court of Appeals opinion, thus stood and stands further impeached and discredited as a matter of law, and was therefore entitled to no consideration whatsoever.

Authorities Cited by Court of Appeals in Opinion.

It is interesting to note that even had San Juan ceased all mining operations on the properties involved, this fact alone would have been insufficient to support a finding of abandonment. This is apparent from the authorities cited by the Court of Appeals in its opinion.

The opinion in the case of *Ellis* v. *Brown*, 177 F. 2d 677, contains the following, at page 680:

> "Mere absence from and nonuser of property are not sufficient evidence of intent to abandon. *Rice* v. *Rice, supra*, 243 Ky. 837, 846, 50 S.W. 2d 26."

Section 242 of *Thornton Oil & Gas*, states the following (page 149, 1956 Supplement):

> "To constitute an 'abandonment' of mining claim, there must be a concurrence of act and intent, namely, the act of leaving the premises or property vacant, so that it may be appropriated by the newcomer, and the intention of not returning. *Neither cessation of work on mining claim nor absence therefrom, though prolonged, necessarily constitutes 'abandonment'* since there can be no 'abandonment' without an intention to abandon." (Emphasis added.)

The opinion in the case of *Del Giorgio* v. *Powers*, 81 P. 2d 1006, contains the following, at page 1013:

> "'To constitute such abandonment, there must be a concurrence of act and intent, *viz.*, the act of leaving the premises of property vacant, so that it may be appropriated by the next comer, and the intention of not returning. *Judson* v. *Malloy*, 40 Cal. 299; *Bell* v. *Bed Rock, etc., Co.*, 36 Cal. 214; *Moon* v. *Rollins*, 36 Cal. 333 (95 Am. Dec. 181); *St. John* v. *Kidd*, 26 Cal. 263; *Richardson* v. *McNulty*, 24 Cal. 339; *Willson* v. *Cleaveland*, 30 Cal. 192. The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; *nor will the nonuser alone without an intention to abandon, be held to amount to an abandonment*'." (Emphasis added.)

In the case at bar, the record is wholly devoid of any evidence establishing an intent by San Juan to abandon the properties involved herein. On the other hand, the record conclusively shows that San Juan continued to assert its interest in said properties as well as to conduct mining operations thereon after the date of the alleged "abandonment" which formed the sole basis for the erroneous decision of the Court of Appeals affirming the trial Court judgments.

6. Mining operations admittedly continued on the Hazel group claims. This fact was specifically noted in the purported default notice itself (Pltfs. Ex. No. 10), which excluded the Hazel group and the Sunset and Sunrise groups from any forfeiture. This is also shown by Plaintiffs' Exhibit No. 28, a news release, already referred to, issued by San Juan's Secretary, Attorney and Director, Hosford, on October 13, 1955. San Juan President Chadwell even conceded on recross examination (R. 686) that San Juan conducted these operations on the Hazel group properties.

Appellants respectfully submit that this one undisputed circumstance alone negates and renders clearly erroneous any finding of abandonment, since it is well-established that any abandonment must be complete to become effective. In this connection, Section 242 of *Thornton Oil & Gas* states (page 427):

> "The lessee cannot abandon a part of the premises and retain a part; to render his act of abandonment effectual, he must abandon the whole premises and all his rights under the lease."

San Juan did not abandon any part of the premises involved herein. But its conceded and undenied continuance of mining operations on the Hazel group after the time of the alleged abandonment in and of itself rendered any finding of abandonment clearly erroneous and a nullity.

7. San Juan continued long after the time of the alleged abandonment to assert its interest in the properties. This is noted in the Court of Appeals opinion herein, as follows:

> "And appellants' counsel has called our attention to collateral pleading by San Juan in which it asserted some interest in the properties after the alleged abandonment."

One pleading referred to by the Court is the answer filed by San Juan in Cause No. 8990 Civil in the District Court for Fremont County, Wyoming. This suit involved the Blanco group of claims, one of the properties involved, which allegedly were completely abandoned by San Juan after the purported default notice dated October 7, 1955, was served upon San Juan. In this answer filed *four months* after the time of the alleged abandonment, San Juan states (Paragraph 3):

> "Defendant admits that it asserts an interest in the property described in plaintiff's Petition . . . "

Thereupon, San Juan sets forth the chain of title from which its mining rights are derived, and concludes its answer with a prayer for confirmation of those rights by the Court.

Another pleading referred to by the Court is a reproduction of a certified copy of the answer filed by San Juan in Cause No. 9062 Civil in the District Court for Fremont County, Wyoming. This suit involved the Rim group of claims, another of the properties involved, also allegedly completely abandoned by San Juan after it received the purported default notice. In this answer, filed *six and one-half months* after the time of the alleged abandonment, San Juan states (Paragraph 4):

> "Defendant admits, as alleged in Paragraph 3 of the Petition, that it asserts an interest in the property described in Plaintiff's Petition . . . "

Then follows a description of the chain of title from which San Juan derives its rights, including the May 2, 1955, San Juan-Mountain Mesa agreement. At the conclusion of the answer, San Juan prayed confirmation of its mining rights as acquired under the "sublease of May 2, 1955, as amended", that is by the revised and supplemental agreement.

Despite mention in the Court of Appeals opinion of these pleadings, which were attached to petitioners' reply brief, that Court obviously failed to give proper consideration to the legal import and effect of these San Juan corporate pronouncements affecting the question of "abandonment".

8. An independently conclusive refutation of any "abandonment" by San Juan is contained in the agreement it entered into on September 12, 1956, with Coleman and Riverton (Pltfs. Ex. No. 39; R. p. 894). This instrument contains the *specific warranties and covenants* which San Juan made in connection with its assignments of mining rights to Riverton. These warranties and covenants, contained in Paragraph 2 of the agreement, made almost one year after the date of the alleged abandonment, speak for themselves, and conclusively negate any contention that San Juan had abandoned its rights.

Paragraph 2 of said settlement agreement reads as follows (R. p. 895):

> "2. It is recognized that MOUNTAIN MESA, in the aforesaid pending legal action, is questioning the extent of the aforesaid rights, and SAN JUAN is therefore unable to make comprehensive warranties in connection therewith; SAN JUAN *does warrant and covenant, however, that any right, title and interest it has acquired in said properties has not heretofore been assigned, transferred, conveyed or set over to any person or corporation* (except by said agreement, dated July 30, 1955, or as provided for in a settlement heretofore made with GLOBE MINING CO., a Wyoming Corporation, affecting certain of the aforesaid Sunset claims and the aforesaid Sunrise claims); SAN JUAN *further warrants and covenants that it has received no written notices of default from* MOUNTAIN MESA *since receipt of a letter, dated October* 7, 1955, addressed to it by EDWARD E. MURANE, ESQ., attorney for MOUNTAIN MESA (said letter having been identified in the aforesaid civil action as Plaintiffs' Exhibit No. 20-c for Identification),

affecting some of the foregoing properties; it is recognized by the parties hereto that Coleman and Riverton strenuously dispute the contention of MOUNTAIN MESA that SAN JUAN has ever been legitimately, properly, or legally defaulted under and by virtue of the provisions of the aforesaid agreements, through which its rights in said properties were acquired, and *nothing herein contained shall constitute a recognition by the parties hereto that such default in fact exists.*" (Emphasis added.)

On September 13, 1956, San Juan delivered the written assignment to Riverton that it had contracted to make. This instrument is Plaintiffs' Exhibit No. 12, and appears in the record herein at pages 110, 111, and 112.

In its opinion, the Court of Appeals completely overlooked, or ignored, this important documentary evidence refuting "abandonment", or any intention to abandon the properties involved.

Evidence of Abandonment Must Be Clear, Decisive and Conclusive.

The following appears at Section 242 of *Thornton Oil & Gas,* cited by the Court of Appeals in its opinion (page 427):

> "The question of an intent to abandon is one of fact, and there must be evidence to sustain such a finding. *The burden to show an abandonment is upon the plaintiff to establish it by clear, unequivocal evidence.*" (Emphasis added.)

And (page 150, pocket part, 1956 Supplement):

> "Abandonment of a mining claim is a question of intention, and *can be sustained only by clear proof.* 'Abandonment' of a mining claim requires a relinquishment of all rights with the intention never to return, and with a voluntary and independent purpose to surrender the locations or claims to the next comer." (Emphasis added.)

Concerning the degree of proof necessary to establish abandonment, the opinion in the case of *Hoff* v. *Girdler Corporation,* 88 P. 2d 100, cited by the Court of Appeals in its opinion, contains the following, at page 102:

> "The burden of showing abandonment is upon the party who relies thereon, and *he must establish it by clear, unequivocal and decisive evidence.* 1 Thornton's Law of Oil and Gas, 4th ed. § 155; 1 Am. Jur. 12, § 17; 1 R.C.L. 7; *Hall* v. *Roberts,* Tex. Civ. App., 228 S.W. 1008." (Emphasis added.)

The following appears in the opinion in the case of *Wilson v. Colorado Mining Co.,* 227 F. 721, at page 725:

> "The presumption is that the owner of property or of rights to property intends to preserve them, because this is the customary purpose of such owners, and the burden is upon him who alleges abandonment clearly to establish the intent to abandon by evidence sufficient to overcome this strong natural presumption."

The record in this cause is utterly devoid of any evidence which would establish that San Juan abandoned the properties involved herein before it assigned its rights therein to Riverton. The evidence is *clear, unequivocal and decisive* that *no such abandonment took place.*

Circumstances "Suspicious", Says Court of Appeals.

The Court of Appeals notes in its opinion:

> "Of course, if, as appellants suggest at one point in their brief, the acts of abandonment were done pursuant to a collusive agreement between Mesa and San Juan, the court would disregard any such abandonment in the determination of appellants' contractual rights. In the prior appeal, some emphasis was laid on Mesa's knowledge of the negotiations and transactions between San Juan and Coleman. *And, the quickness with which Mesa declared a default and San Juan informed Coleman of the loss of his rights in the property are suspicious.*" (Emphasis added.)

Are not these "suspicions", which the Court of Appeals recognized and took cognizance of in its opinion, directly in contradiction to any finding that petitioners' rights were lost because of "abandonment" by San Juan?

The Record is replete with other circumstances indicating collusion between San Juan and Mountain Mesa to deprive petitioners of their rights in and to the properties involved. On the other hand, the uncontrovertible evidence negating "abandonment", noted above, is and was *clear, decisive and conclusive.*

No Possibility of Abandonment on Excluded Properties.

As noted in the Court of Appeals opinion, the agreement executed September 26, 1955, and pre-dated September 7, 1955, "by consent", provided expressly "for continuous mining operations and for default twenty days after cessation thereof." The letter from Mountain Mesa's attorney to San Juan purporting to default San Juan as to most of the properties involved was dated October 7, 1955, *only eleven days* after execution of the agreement and in complete violation thereof. As is also noted in the said opinion, the purported "notice of default" excluded "certain properties on which San Juan had acquired mining rights under the revised agreement."

It is inconceivable that this "default notice", assuming for the moment that it was valid, could affect Riverton's rights and interest in the excluded properties, for example, in the Sunset group of claims. Except for mentioning the exclusion of "certain properties", as noted, the said opinion contains nothing concerning this matter which is of vital importance to petitioners. They can only assume that this is due to an inadvertent oversight, and they respectfully submit that it constitutes a good and valid reason for granting of the writ of certiorari and the review for which they pray.

Quite obviously; the default notice could not operate to deprive San Juan of its rights in the Sunset, Sunrise,

or Hazel claims, since these were specifically excluded in it. *No default notice was ever served covering these properties.*

The letter which Chadwell wrote Coleman on October 19, 1955 (Dfts. Ex. E), cited by the Court of Appeals in its opinion as corroborating a finding of abandonment, also excludes these properties, stating that the notice had been received "cancelling our 'farm-out' contract with Mountain Mesa *on all except the Sunset, Sunrise and Hazel claims.*" (Emphasis added.) Therefore, the citing by the said Court of this letter as "corroboration" of abandonment in relation to the Hazel, Sunset and Sunrise claim groups was even more clearly erroneous.

The purported default notice recited that the Hazel group was excluded because of mining operations proceeding thereon.

The Sunset and Sunrise claims were excluded from it because of the fact that the properties were "involved in litigation", at that time the Globe Mining Co. suit being pending. Although that litigation was terminated in the summer of 1956, shortly before San Juan transferred its rights in the properties to Riverton, it is also a fact that this cause had been commenced in the interim (on December 9, 1955). Thus, the reason assigned by Mountain Mesa in October, 1955, for excluding these properties from the purported default notice continued up to and including September 13, 1956, when San Juan transferred its rights therein to Riverton. How could Mountain Mesa assert that San Juan "abandoned" properties as to which its obligations under the revised agreement had admittedly been suspended by Mountain Mesa itself because of a situation which persisted to and including the time when San Juan transferred those rights?

Under these circumstances, the very authority cited by the Court of Appeals in its opinion decrees that no abandonment may be asserted.

In this connection, the following appears at Section 227 of *Thornton Oil and Gas* (page 397).

> "An agreement that the lessee should have further time to complete the development of the premises, even if made after the lease expired, is binding on the lessor."

Section 242 of the same authority contains the following (page 427):

> "If the lessor acquiesce in the temporary or other cessure of work for a period extending beyond the time when the work was to have been completed, he cannot because of such cessure, especially where the lessee has resumed operations at a considerable expense to himself, insist that there has been an abandonment." (Citing authority.)

Thus respondent was and is debarred from asserting any abandonment as to the Sunset and Sunrise claim groups, it having specifically suspended San Juan's obligations in connection therewith to the time mining rights in said properties were transferred to Riverton.

There is of course no evidence in the record herein that San Juan abandoned the Sunset or Sunrise claim groups. On the contrary, when San Juan issued an announcement to the press (Pltfs. Ex. No. 28) after it had received the purported default notice, it was proclaimed to the public:

> "Shipments of uranium ore were being made from the Sunrise and Sunset groups of claims prior to suit instituted by the Globe Mining Company challenging title to these claims. San Juan acquired its right to mine these claims through its working agreement with Mountain Mesa. As soon as the question of title is settled, *San Juan contemplates a resumption of regular shipment from these properties . . .* " (Emphasis added.)

The only way that Mountain Mesa could have caused forfeiture of San Juan's rights in the Sunset, Sunrise and Hazel group properties was through a written notice complying in every respect with the legal provisions and requirements of the revised and supplemental agreement. No such notice was ever served. Riverton's rights in these

properties, which were *specifically excluded from forfeiture* in the only default notice appellee ever served, stem from an irrefutable, clear, direct and unbroken chain of interest. Petitioners pray that the gross injustice which they have thus far sustained may be remedied and that the same may be confirmed through the granting of certiorari and a review by this Court.

The Court of Appeals Has Departed from the Accepted and Usual Course of Judicial Proceedings.

The Court of Appeals in rendering its said opinion has so far departed from the accepted and usual course of judicial proceedings or it has, at least, sanctioned such a departure by the trial Court as to entitle petitioners to the granting of the writ of certiorari and a review by this Court.

Certainly, the judgments of the lower Courts decreeing "abandonment" by San Juan violate the law as expressly laid down by this Court.

The opinion in the case of *Baglin* v. *Cusenier Co.*; 221 U.S. 580, for example, contains the following, at page 597:

> "There must be found an *intent to abandon*, or the property is not lost; and while, of course, as in other cases, intent may be inferred when the facts are shown, yet the facts must be adequate to support the finding. 'To establish the defense of abandonment it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed.' *Saxlehner* v. *Eisner & Mendelson Company*, 179 U.S. 19, p. 31."

And, in decreeing "abandonment" in the face of *written instruments* containing clear, decisive and conclusive evidence negating "abandonment", the lower Courts grossly violated the binding pronouncement laid down by this

Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, the leading case on the effect of oral testimony in conflict with contemporaneous documents. The opinion in that case contains the following (page 394):

> "The government relied very largely on documentary exhibits, and called as witnesses many of the authors of documents . . . *Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact.* Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous." (Emphasis added.)

The Court of Appeals also violated its own prior rulings in similar cases.

For example, it is interesting to note how far the Court of Appeals for the Tenth Circuit went in the case of *Sadler* v. *Public Bank & Trust Co. of New York*, 172 F. 2d 870, in decreeing that there had been no "abandonment". This case, incidentally, involving an oil and gas lease, is one of the authorities cited in said Section 242 of *Thornton Oil & Gas*. In the *Sadler* case that Court found that a failure to develop the tract involved *for a period of thirty years* was insufficient to constitute abandonment. In the case at bar, the time-period before occurrence of alleged abandonment was measured in mere days.

CONCLUSION.

Because of the fact that the Court of Appeals predicated its opinion affirming the judgments of the trial Court upon the theory that San Juan "abandoned" its interest in the properties involved and thus had no interest to assign to Riverton, this petition has narrowed the issues in this cause to the question as to whether or not such "abandonment" in fact took place. Petitioners contend that it did not and that what has been said hereinabove clearly establishes that fact. They feel that, under the circumstances,

it would be grossly unjust to them and a grave miscarriage of justice, if the judgments of the lower Court in this cause are permitted to stand.

This Honorable Court has frequently granted certiorari in the past to prevent and correct injustice. One such case illustrating the length to which this Court will go to prevent a miscarriage of justice is *Maggio* v. *Zeitz*, 333 U.S. 56, involving a bankrupt (Maggio) who had been found in contempt by a referee in bankruptcy (Zeitz). The District Court affirmed the referee's finding and ordered the bankrupt committed to jail until he complied with a "turnover order"; the Circuit Court of Appeals affirmed the judgment of the District Court.

The Court of Appeals, in its affirming opinion, included the following:

> "Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which first direct Maggio 'to do an impossibility, and then punish him for refusal to perform it'."

This Court's opinion comments as follows concerning this (p. 59):

> "Whether this is to be read literally as its deliberate judgment of the law of the case or is something of a decoy intended to attract our attention to the problem, the declaration is one which this Court, in view of its supervisory power over courts of bankruptcy, cannot ignore."

The concern with which this Court viewed the injustice that would be perpetrated upon Maggio should it affirm the judgments of the referee and the two lower Courts and the complete review given by it to the proceedings below are clearly shown in the opinion, almost twenty pages in length, which concludes with the following (p. 77):

"When such a misapprehension of the law has led both courts below to adjudicate rights without considering essential facts in the light of the controlling law, this Court will vacate the judgments and remand the case to the District Court for further proceedings consistent with the principles laid down in this Court's opinion. *Manufacturers' Finance Co.* v. *McKey*, 294 U. S. 442, 453, *Gerdes* v. *Lustgarten*, 266 U.S. 321, 327, and cases cited. That practice is appropriate in this case in view of what has been said herein concerning the judgments below."

The said judgments were thereupon vacated and the cause remanded.

In the case at bar, the lower Courts deprived petitioners of their rights "without considering essential facts in the light of the controlling law". Petitioners sincerely pray that this grave injustice may be remedied.

Petitioners respectfully submit that the circumstances in the case at bar fully justify this Court in granting them certiorari and a sufficient review to determine, finally, whether or not San Juan did in fact "abandon" its interest in the properties involved. For such action, they respectfully pray.

Respectfully submitted,

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APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS TENTH CIRCUIT

MAY TERM - 1958

CHARLES M. COLEMAN and the RIVERTON URANIUM CORPORATION, a corporation, *Appellants*,
vs.
MOUNTAIN MESA URANIUM CORPORATION, *Appellee*.
NUMBER 5747

RIVERTON URANIUM CORPORATION, *Appellant*,
vs.
MOUNTAIN MESA URANIUM CORPORATION, *Appellee*.
NUMBER 5748

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

Albert W. Dilling (Spence and Hill were with him on the brief) for Appellants.

Edward E. Murane (of the firm of Murane & Bostwick) for Appellee.

Before MURRAH, PICKETT and LEWIS, Circuit Judges.

MURRAH, Circuit Judge.

This appeal from the United States District Court of Wyoming involves determination of the ownership of mining leases on certain uranium properties in Fremont County, Wyoming. The dispute arose as the result of contrac-

tual negotiation between appellee, Mountain Mesa Uranium Corporation, and San Juan Uranium Corporation, followed by dealings between San Juan and appellant, Coleman.

On May 2, 1955, Mountain Mesa granted to San Juan the mining lease to the properties involved herein under an agreement obligating San Juan to conduct continuous mining operations on them, and to remit to Mesa a percentage of the profits therefrom.

On the following July 30, San Juan entered into an agreement with Coleman, subject to ratification by its Board of Directors, granting Coleman an option to buy its mining rights, provided that certain presently immaterial amendments were made to the May 2 agreement between Mesa and San Juan, and conditioned upon the payment of $2,500.00 by Coleman within seven days after demand.

On the following September 26, Mesa and San Juan entered into a revised lease agreement (predated September 7 by consent), incorporating the changes contemplated in the July 30 San Juan-Coleman agreement. It expressly provided for continuous mining operations and for default twenty days after cessation thereof.

Shortly after the September 26 revised agreement, Coleman sought to exercise his alleged option on the mining lease held by San Juan. Very soon thereafter, Mesa mailed San Juan a notice of default for failure to comply with the continuous mining obligations of their lease, excluding however, certain properties on which San Juan had acquired mining rights under the revised agreement. Upon receipt of this default notice, San Juan wrote to Coleman that all of its rights had been lost so that "San Juan does not have a farm-out agreement to transfer to anyone."

In the following December, Coleman and his assignee, Riverton, brought this suit against San Juan and Mesa,

seeking performance of it July 30 agreement with San Juan, and praying damages. The complaint was inordinately and inexcusably prolix, but included allegations showing the dealings between the various parties and also allegations of collusion between San Juan and Mesa in the purported default of San Juan's mining rights.

The trial court first sustained a motion for summary judgment in favor of Mesa, though not San Juan. On appeal, we reversed, holding that the pleadings and depositions stated a disputed issue of fact which, if successful in proof, would entitle Coleman and Riverton to recovery against Mesa. *Coleman et al.* v. *Mountain Mesa Uranium Corp.*, 240 F. 2d 12. During the pendency of the appeal on the summary judgment, Coleman and Riverton entered into a separate settlement agreement with San Juan, under which San Juan transferred any interest it might have in the mining rights to Riverton.

On trial after remand, the court found that the July 30 agreement granting an option on the mining rights to Coleman was not ratified by the San Juan Board of Directors as required by its terms, hence never binding on San Juan. It found, furthermore, that San Juan accepted the notice of default by Mesa and abandoned all "rights and interests" acquired under their contracts with Mesa, and that Coleman and Riverton had generally failed to sustain the burden of their allegations.

On appeal, appellants attack the findings of the court on lack of ratification of the San Juan-Coleman July 30 agreement, and on San Juan's default and abandonment of the Mesa-San Juan revised agreement.

If, as the trial court held, the San Juan-Coleman agreement was never ratified by the San Juan Board, neither Coleman nor Riverton acquired any rights in the mining

property and the controversy ends there, unless, of course, they acquired some rights in their settlement agreement with San Juan during the pendency of this litigation. There is evidence in the record tending to show implied ratification, and there is also a debatable issue of forfeiture in view of the time and content of the default notice. But if the court did not err in its finding on abandonment, a discussion of ratification is academic, and a decision on the harsh grounds of forfeiture of San Juan's rights is unnecessary, for abandonment assuredly puts all matters to rest.

Forfeiture is harsh and disfavored. Abandonment rests upon the intent of the lessee to relinquish his rights coupled with a quitting of the premises. Abandonment is voluntary, forfeiture coercive. See *Ellis* v. *Brown*, 177 F. 2d 677; *Fuqua* v. *Chester Oil Co.*, 246 SW 2d 1007; *Hudspeth* v. *Schmelzer*, 77 P. 2d 1123; *Hoff* v. *Girdler*, 88 P. 2d 100; *Storm* v. *Barbard Oil Co.*, 282 P. 2d 417; *Bradley* v. *Fackler*, 126 P. 2d 190; *Del Giorgio* v. *Powers*, 81 P. 2d 1006; *Thornton Oil & Gas*, § 242; Annot. 60 A.L.R. 926; 36 Am. Jur., Mines & Minerals, § 58.

San Juan's president, Chadwell, testified at the trial that San Juan abandoned its rights to the property and did no more mining operations on the claims. This is corroborated by the letter Chadwell wrote Coleman in early October 1955, telling of Mesa's default notice, after which San Juan had no "farm-outs to transfer to anybody." Further testimony in the record shows that mining operations on the claims after the default notice were carried on by agents of Mesa rather than by San Juan. It is true that Chadwell's testimony was impugned on cross-examination by a letter he wrote and by a new release given by another San Juan officer, indicating mining operations were conducted by San Juan after the default. And

appellants' counsel has called our attention to collateral pleading by San Juan in which it asserted some interest in the properties after the alleged abandonment. But when all of the contravening evidence is considered in totality, we cannot say that it is sufficient to overcome the direct testimony of abandonment so as to render the court's findings thereon clearly erroneous.

As an optionee from San Juan, Coleman stood in its shoes. He acquired no greater right to the property than San Juan held under its agreement with Mesa. Nor is Riverton's position more advantageous since its rights rest on its assignment from Coleman and its settlement agreement with San Juan.

Of course, if, as appellants suggest at one point in their brief, the acts of abandonment were done pursuant to a collusive agreement between Mesa and San Juan, the court would disregard any such abandonment in the determination of appellants' contractual rights. In the prior appeal, some emphasis was laid on Mesa's knowledge of the negotiations and transactions between San Juan and Coleman. And, the quickness with which Mesa declared a default and San Juan informed Coleman of the loss of his rights in the property are suspicious. But suspicious coincidence of time of events do not compel a verdict of guilt, especially in the face of the trial court's general finding to the contrary.

The judgment is affirmed.